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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/616,122	07/07/2003	Robert F. Merchant	40022	2208

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KLARQUIST SPARKMAN, LLP  
121 SW SALMON STREET  
SUITE 1600  
PORTLAND, OR 97204

EXAMINER
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SHAY, DAVID M

ART UNIT	PAPER NUMBER
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3735

DATE MAILED: 03/09/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/616,122

Applicant(s)

MERCHANT

Examiner

david shay

Art Unit

3735

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on November 15, 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-13, 15-29, 33-36 and 40-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-13, 15-29, 33-36 and 40-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

Applicant argues that 706.02(j) requires that “there must be a) a suggestion or motivation in the references to combine reference teachings...”. The examiner respectfully invites applicant’s attention to section 706.02(j) which states in pertinent part “there must be some suggestion or motivation in the references themselves or in the knowledge generally available to one of ordinary skill in the art to combine reference teachings...”.

Applicant then argues that the office “focuses on Salansky’s use of laser radiation having a wavelength of 400 to 2000 nm” while the claims recite limitations concerning the depth to which the laser radiation penetrates the skin. The examiner respectfully notes that that the disclosed wavelengths of applicant: 532 nm and 1064 nm, are contained in the 400-2000 nm range disclosed for use by Salansky et al. The examiner respectfully submits that use of the 532 nm or 1064 nm portion of the range of Salansky et al will penetrate to the same depth and to the same degree in the method of Salansky et al as in that of applicant. For example the 1060 nm radiation of Salansky et al, disclosed at column 10, lines 28-34 will have just as substantial a portion of the radiation penetrate to the various skin depths and have substantially the same absorption in the various tissues as the 1064 nm radiation of applicant. Thus while the use depths of penetration discussed by Salansky et al from column 10, line 7 to column 11, line 30 are different from that discussed by applicant are noted, the examiner cannot construe a substantially different depth of penetration or percentage of the original intensity between the method of Salansky et al and that of applicant absent some undisclosed treatment by applicant, which of course would render the claims unsupported by the originally filed disclosure. Absent this, the examiner has no choice but to conclude that substantially the same wavelength applied

to substantially the same tissue will behave in substantially the same manner, absent some evidentiary showing of a substantially different behavior, none of which is currently of record.

Applicant also argues, regarding claim 1, that Salansky et al “does not teach or suggest treating skin using one laser having a laser wavelength penetrating to a relatively shallow depth and another laser having a wavelength penetrating to a relatively deeper depth than the wavelength of the one laser”. The examiner must respectfully note that there is no requirement in the claims that the “one laser” and “another laser” be different lasers nor that the first and second wavelengths be different, the claim merely requires that the first wavelength be absorbed by hemoglobin and melatonin and that the second wavelength be absorbed by de-oxygenated hemoglobin. It is noted that two separate laser pulses of the same wavelength, but one pulse having a higher energy density than the other, will penetrate to different depths. It is further noted by the examiner that all the wavelengths of Salansky et al penetrate to different depths, and thus any one will penetrate to a relatively deeper or shallower depth than another. Lastly, as specifically states that “Strictly monochromatic light source is a source of radiation with exactly the same wavelengths (sic). This is never achieved in practice even with a laser. Every light source can be described by its spectrum bandwidth  $\Delta\lambda(\text{nm})$ .” Thus even the use of a single light source would produce two different wavelengths, which would not have exactly the same absorption properties and each of which would be absorbed, at least minutely by the three recited tissue components. Applicant also notes that neither Salansky et al nor the combination involving Schmeller teaches the disclosed advantages. The examiner notes that this alone has no bearing on the propriety of a rejection under 35 USC 103. Next applicant attempts to rebut the rejection by noting that there are several embodiments of erythema treatment disclosed by

Salansky et al and that there is no teaching of using the particular one the examiner has employed in the rejection. The examiner notes that a reference is a valid teaching for all embodiments disclosed therein, not just the preferred embodiment (see In re Boe 148 USPQ 507). Thus this argument is not convincing.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-13, 15-24, 35, 36, and 40-51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schmeller et al in combination with Salansky et al. Schmeller et al teach that lipodermatosclerosis can involve erythema. Salansky et al teaches that edema and inflammation can be treated by exposure to laser radiation in a range from 400 to 2000 nm; multiple treatments; and multiple wavelength treatments. It would have been obvious to the artisan of ordinary skill to employ the parameters of Salansky et al to treat lipodermatosclerosis, since this involves erythema, as taught by Schmeller et al, and extravasation of red cells, official notice of which is hereby taken, and similarly to treat lipodermatosclerosis that is weeping, for the same reasons, thus producing a method such as claimed.

Claims 25-29, 33, 34, and 52-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schmeller et al in combination with Salansky et al as applied to claim 1-13, 15-24, 35, 36, and 40-51 above, and further in combination with Baranov et al. Baranov et al teach the use of 532 nm radiation to treat skin disorders. It would have been obvious to the artisan of ordinary skill to employ a 532 nm wavelength in the combined method of Salansky et al and Schmeller et al, since this promotes the growth of the extracellular matrix by inducing a wound healing response without inducing a wound, as taught by Baranov et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to david shay whose telephone number is (571) 272-4773. The examiner can normally be reached on Tuesday through Friday from 6:30 a.m. to 5:00 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco, can be reached on Monday through Friday. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



DAVID M. SHAY  
PRIMARY EXAMINER  
GROUP 330